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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 197

GEORGE F. VASEN, *Petitioner*

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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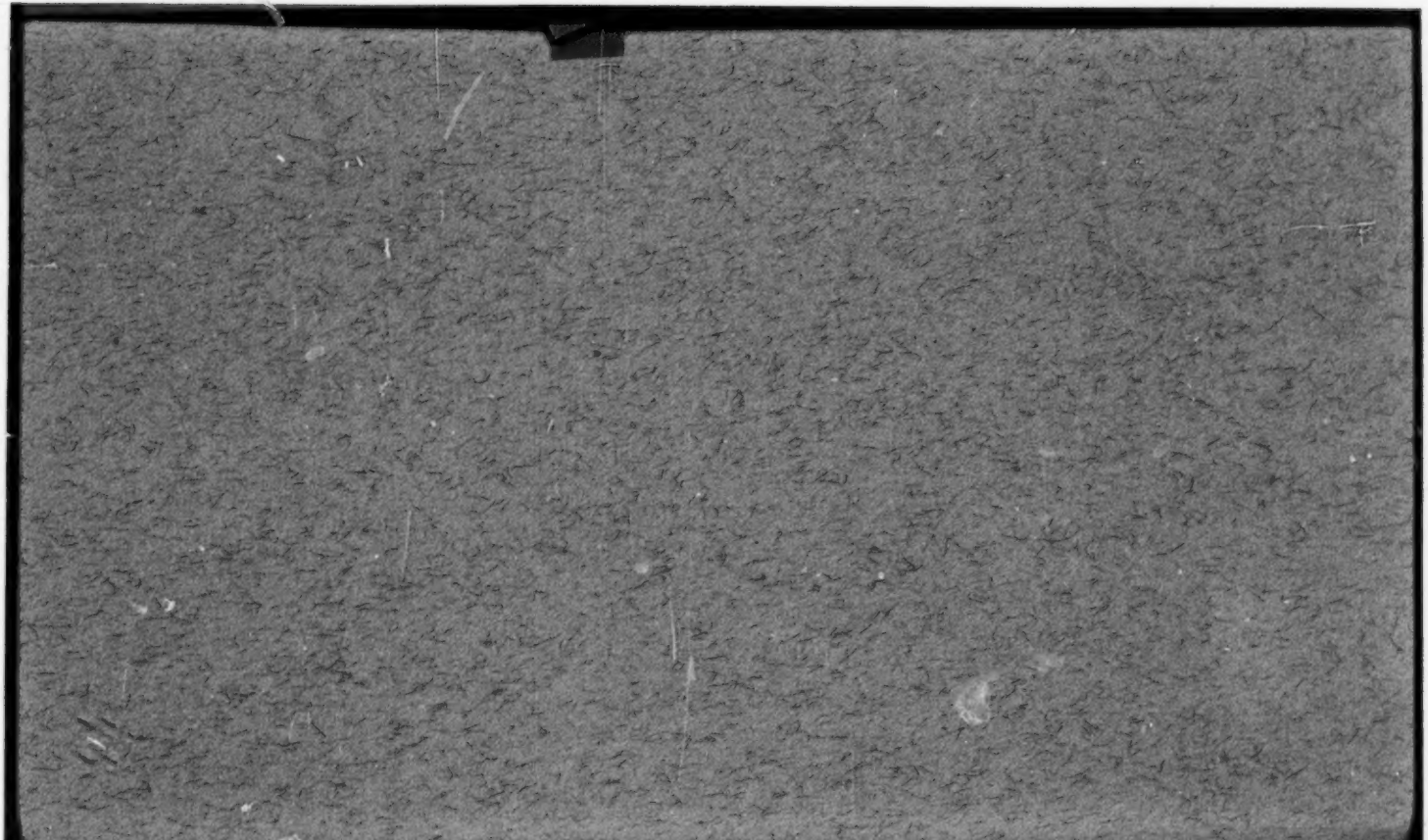

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, George F. Vasen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case, affirming the judgment of the District Court of the Northern District of Illinois, Eastern Division, No. 11,209.

OPINIONS BELOW

There was no opinion in the District Court. There were two opinions in the Court of Appeals; the majority opinion being delivered by Circuit Judges Major and Lindley and the minority opinion being delivered by Circuit Judge Finnegan. These opinions are not yet reported and are set forth in the Appendix at pages 1a to 14a.

JURISDICTION

The Court of Appeals filed and entered its judgment affirming the judgment of the District Court on April 15, 1955, denied the Petition for Rehearing on June 3, 1955, and stayed its mandate on June 8, 1955 for a period of thirty (30) days pending the filing of this application for a writ of certiorari.

The jurisdiction of this Court is invoked under section 1254 (1), Title 28 U. S. Code.

The jurisdiction of this Court is invoked to review the decision of the Court of Appeals affirming the judgment of the District Court on the following grounds:

The decision of the Court of Appeals sustains the conviction of the petitioner in a criminal prosecution wherein the District Court denied the petitioner a fair trial by an impartial jury and the effective assistance of counsel for his defense in violation of his rights under the Sixth Amendment to the Constitution of the United States.

The decision so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The decision embodies important questions of federal law which have not been, but should be settled by this Court.

The decision is in conflict with the decisions of other Courts of Appeals on the same matters in: *Braswell* v. *United States,* 5th Cir. 1952, 200 F. 2d 597, 602; *Billeci* v. *United States,* DC Cir. 1950, 87 App. D. C. 274, 184 F. 2d 394, 24 ALR 881; *Coplon* v. *United States, DC Cir.* 1951, 89 App. D. C. 103, 114, 191 F. 2d 749, certiorari denied 342 U. S. 926; and *Butzman et al.* v. *United States,* 6th Cir. 1953, 205 F. 2d 343, 351, certiorari denied 346 U. S. 828.

The decision is in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED

1. Where the trial Judge addressed the jury at the beginning of petitioner's trial in the District Court about a wholly unrelated and notorious criminal case which had just previously been tried in the same Court, commenting upon the evidence therein and giving a summation of his judicial reaction to the previous jury's verdict of not guilty, and where the remarks clearly implied that criticism reflecting upon their honesty, integrity and intelligence as jurors awaited the members of any jury whose decision failed to agree with the views of the presiding Judge, did the remarks of the trial Judge deny the petitioner a fair trial by an impartial jury in violation of his rights under the Sixth Amendment to the Constitution of the United States?

2. Did the Court of Appeals err in holding that the remarks of the trial Judge did not constitute plain error adversely affecting a substantial right of the

petitioner and in sustaining the conviction of the petitioner?

3. Where the issues, whether the District Court denied the petitioner his right under the Sixth Amendment to the Constitution of the United States to have the effective assistance of counsel for his defense and whether this right was intelligently and voluntarily waived, were raised for the first time on an incomplete record in the Court of Appeals, did the Court of Appeals err in denying petitioner's request to suspend its ruling on the appeal for a reasonable time to afford petitioner an opportunity to present these issues to the trial Court and to bring the matter back to the Court of Appeals for a final ruling?

CONSTITUTIONAL PROVISIONS

Amendment VI of the Constitution of the United States, 1 Stat. 97, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

The pertinent parts of section 1341, Title 18, U. S. Code; section 77 q (a), Title 15, U. S. Code; section 77 e (a), Title 15, U. S. Code and section 2255, Title 28, U. S. Code, are set forth in the Appendix to this Petition at pages 15a to 17a.

STATEMENT

The judgment of the Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner on an indictment in which five counts charged the use of the mails pursuant to a scheme to defraud in violation of section 1341, Title 18, U. S. Code; three counts charged the use of the mails to sell securities pursuant to a scheme to defraud in violation of section 77 q (a), Title 15, U. S. Code; and one count charged the sale of an unregistered security by use of the mails in violation of section 77 e (a), Title 15, U. S. Code.

After the jurors had been sworn in the District Court, to try the issues of the petitioner's guilt or innocence of the foregoing charges and before they had received any evidence, the District Judge addressed the jury as follows:

> THE COURT: Now, Ladies and Gentlemen, we will have the opening statement by the Government. It just happens that counsel for the defendant has a severe condition of laryngitis, and I will not impose upon him to give his opening statement this afternoon. We will then adjourn until one o'clock Monday when we will resume and have his statement and proceed with the case, putting on evidence.
>
> I apologize for the delay today, but since you were here I tried a number of cases; one of them we just finished today, involving a complicated matter. It just happened it ran over and I couldn't help it.
>
> I think in fairness to this defendant I should say something to you Ladies and Gentlemen before this case starts. I do not want you people to get the impression that I as a judge have any notion about what you should do as members of the

jury, and I am going to try to give this defendant a fair trial and give the Government a fair trial.

I have been practicing law and been a judge altogether over a period of upwards of twenty-seven years; about twenty-five of that was as a lawyer. I have disagreed with a few juries, and not too much. I never criticized but one jury in my life, as a practicing lawyer or as a judge. Most of the decisions that I have seen since I have been a judge were just about the same as I would have rendered. I did criticize one, and some of you may know about it, and I do not regret that I did. If I had it to do over I would again, because in that particular case we had a man who sat here on the witness stand who was charged with robbery and admitted when he took the stand—he did not have to take the stand, but he took the stand and admitted himself that he had been convicted of larceny, and then he admitted that he had pleaded guilty to robbery before, and the jury saw four deputies necessary, sitting around him during the whole time.

When the evidence began to get pretty conclusive about the man at the bank who went to the back door and looked out and saw a car bearing license that was the same number as was on this man's car, the same description of the car, and a man who resembled this man, was blond and gave a description, but too far away to identify him—when it began to get too warm he talked to his attorney and the attorney gets up and says: 'Now, we'll admit that the car in which the robbery was done belonged to us, that it belonged to my client, that he had it in his possession immediately before the robbery, about thirty minutes, and that he had it in his possession immediately after the robbery. The only thing of it is my client went over to get a haircut while it happened.'

And then the testimony further showed that he left a place way up on the north side at three-thirty, on Bosworth Avenue, 1300 something, he took his sister-in-law to his mother's—mind you, leaving at three-thirty—took his sister-in-law to her mother's at her address; then he took his sister-in-law's brother-in-law to this place where the haircut was to take place; then he took the car over to another place, turned it over to one of the two fellows who had testified that they were with him and held up the bank and used the guns, and that the car and the guns were furnished by him, and who were not in any way impeached—two much younger fellows—all of that—and the robbery was done and completed and the police were there at five minutes after four, in a period of thirty-five minutes that he accomplished all of those many things.

It sounded to me like you would have had to have Alladin's magic carpet to have moved around over the city of Chicago, because that was out on Harrison Street, around Harrison Street and Crawford, and then still the car had to get over to Cicero where the robbery occurred. It was so impossible and improbable.

But I think in fairness to any defendant that I want you to know that I haven't got any preconceived notions. But in a case like that, a man that confesses that he was guilty of robbery but he just didn't do this one, and with such a flimsy excuse.

I make that statement because I want this defendant, and I want the Government both to have a fair trial, and I do not want you to have any idea that I participate in or have any notions or am in the habit of criticizing juries about their decisions.

Counsel for the Government will proceed.

The United States Attorney on pages 26 and 27 of the Government's brief in the Court of Appeals brings into clearer focus the circumstances which prompted the trial Judge to make these remarks, as follows:

> * * * The case at bar had been called for trial and a jury was selected by January 5, 1954. Due to witness difficulties, the case was continued after the jury was sworn to try the issues. Previously, in December, 1953 the trial court undertook the trial of one Alphonse Bartkus, who was charged with bank robbery. In spite of rather conclusive testimony as to the guilt of Bartkus the jury found him not guilty on December 18, 195[3]. [Records of the United States District Court: United States v. Vasen, 53 Cr. 361, United States v. Bartkus, et al., 53 Cr. 537.] Whereupon the trial court, exercising a general duty to interest himself in the fair and impartial administration of justice, saw fit to comment in no uncertain terms on the whimsical, capricious or possibly the corrupt verdict of the jury. Who can deny the responsibility of the trial court in such a matter?
>
> The attendant publicity was what is commonly referred to as front-page news, and it lasted for several days. However, within a month after the articles relating to the Judge's comments appeared in the Chicago area newspapers, the trial of the case at bar was commenced.

In referring to the remarks of the trial Judge the Court of Appeals, in the majority opinion below, stated:

> * * * Evidently the judge had been dissatisfied with an apparent miscarriage of justice in a previous case, where the jury had ignored the evidence and acquitted a defendant who, the judge undoubtedly thought, was guilty. Rather wide publicity had been given the incident by the press.

Thereafter the trial proceeded with the introduction of evidence, consisting of the testimony of numerous witnesses and more than two hundred documentary exhibits, and continued intermittently from the 15th day of January to the 3rd day of March, 1954 when the jury returned a verdict finding the petitioner guilty as charged in the indictment and the trial Judge sentenced the petitioner upon certain counts of the indictment to five years in the custody of the Attorney General, to pay fines totalling twenty-five thousand dollars ($25,000.00), and ordered the petitioner placed on probation for a period of five years, following his release from custody, upon other counts.

The petitioner did not testify in his own behalf.

In the Petition for Rehearing in the Court of Appeals petitioner contended for the first time that the District Court had denied the petitioner his right under the Sixth Amendment to the Constitution of the United States to have the effective assistance of counsel for his defense and that he had not intelligently and voluntarily waived this right. On this issue the record is incomplete in that it contains a part but not all of the facts and circumstances which the petitioner contends will substantiate these contentions.

In these circumstances the petitioner requested the Court of Appeals, on the authority of *Butzman et al.* v. *United States,* 6th Cir. 1953, 205 F. 2d 343, 351, certiorari denied 346 U. S. 828, that final judgment on the appeal be suspended for a reasonable period of time, during which the petitioner might present this issue to the trial Court and following which the matter might again be brought to the Court of Appeals for a final ruling.

The petitioner asserted in the Court of Appeals and now asserts in this Court, that if given the opportunity prior to the final judgment herein, he would present to the trial Court, in support of his contentions, the following facts and circumstances:

On October 22, 1953 when the case was first called on the trial calendar, Assistant United States Attorney Calihan announced to the trial Court that he and Assistant United States Attorney Ward would try the case, that it would take from twenty to twenty-five trial days, that the Government was not ready for trial, and that they ought to have a month to get ready.

Assistant United States Attorney Ward was seriously ill during the months of December 1953 and January 1954.

On January 4, 1954 when the case was next called on the trial calendar, Assistant United States Attorney Calihan announced to the trial Court that it was the intention that Assistant United States Attorney Ward would try the case and that he (Calihan) would assist him, that Mr. Ward had been ill and the Government was not ready for trial, that he (Calihan) could get the case ready, that Mr. Ward may not be back for a month, and that he (Calihan) would try the case.

On October 22, 1953 and January 4, 1954 Attorney Swalwell appeared as counsel for the petitioner and announced to the trial Court that he was appearing only as a friend of the petitioner until the petitioner could obtain other counsel for his defense, that he did not intend to act as counsel for the petitioner in the trial of the case, that he had been ill, and that he had made no preparation for the trial.

Prior to January 4, 1954 Assistant United States Attorney Calihan informed Attorney Swalwell that because of Assistant United States Attorney Ward's illness the Government would not be ready for trial. Based upon this information the petitioner understood that the trial would not begin on January 4, 1954 but would be passed to a later date when Mr. Ward was well enough to participate.

On January 4, 1954, when it appeared that the trial Court intended to force the Government and the petitioner to proceed with an immediate trial of the case, Attorney Swalwell repeatedly protested and earnestly requested a continuance so that he might interview and subpoena witnesses and make preparation for the trial, and again advised the trial Court that he had expected other counsel in the case, that he had made no preparation, and that he was not ready for trial.

Whereupon the trial Court refused to grant the request of Attorney Swalwell for a continuance and ordered an immediate trial of the case which was held on January 4, 5, 6, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, February 15, 16, 17, 18, 19, 23, 24, 25, 26 and March 1 and 2, 1954.

Prior to the commencement of the trial on January 4, 1954 the petitioner, realizing the seriousness of the charges contained in the lengthy indictment against him and the complexities of the case with witnesses and business records in the State of Mississippi and elsewhere beyond the jurisdiction of the trial Court, diligently sought to employ counsel for his defense within ample time for adequate preparation for the trial, but petitioner was not financially able to do so.

The petitioner did not know that he had a Constitutional right to the assistance of counsel for his defense, did not know that the trial Court would appoint counsel for his defense, and for this reason did not request the trial Court to appoint counsel for his defense within ample time for adequate preparation of the trial.

The trial Court did not advise the petitioner of the existence and nature of his right to the assistance of counsel for his defense. Moreover, the trial Court made no inquiry of the petitioner with respect to his efforts to employ counsel, with respect to his financial ability or inability to employ counsel, or with respect to his desire to have and his need for the effective assistance of counsel for his defense.

In these circumstances Attorney Swalwell agreed, notwithstanding his lack of preparation and state of ill-health, to act as counsel for the petitioner throughout the trial of the case. However, the facts are that Attorney Swalwell was then suffering ill-health with a serious heart disease which had existed for some time prior to this trial and was not physically able to render to the petitioner the effective assistance of counsel to which the petitioner was entitled. Thus on January 25, 1954 during the progress of the trial Attorney Swalwell became completely incapacitated because of his heart condition, was physically unable to proceed with the trial until the next day, and thereafter only to a limited extent.

Whereupon, on January 26, 1954 the trial Court, acting on his own motion solely because of the obvious ill-health and doubtful physical ability of Attorney Swalwell to continue alone as counsel for the peti-

tioner, appointed Attorney Burns to act with Attorney Swalwell as co-counsel for the petitioner. Attorney Burns had made no preparation for the trial of the case and had no opportunity or reason to be interested in the case until his appointment by the Court. Thereafter the record shows that Attorneys Swalwell and Burns appeared as counsel for the petitioner until the conclusion of the trial.

ARGUMENT

I

The remarks of the trial Judge to the jury denied the petitioner a fair trial by an impartial jury in violation of his rights under the Sixth Amendment to the Constitution of the United States.

The remarks of the trial Judge had no place in the petitioner's trial. They concerned a wholly unrelated criminal case which had received considerable notorious publicity. The case had just previously been tried in the same District Court by the same trial Judge. The jurors had returned a verdict of not guilty and the trial Judge had severely censured and criticized their action. Wide publicity had been given the incident by the press.

At the beginning of petitioner's trial, the trial Judge obviously realized that his public criticism of the action of the prior jurors was improper and reflected upon their honesty, integrity, and intelligence as jurors. It appears that the trial Judge, with the best of intentions, thought it necessary to explain his criticism of the prior jury to the present jurors because some of them might know of the incident and might be improperly influenced, through fear of similar criticism,

to return a verdict of guilty in the petitioner's case. But the trial Judge, despite his good intentions, instead of explaining his criticism, undertook to justify it by detailing the evidence which he believed conclusively established the defendant's guilt and by referring to the previous convictions of the defendant and to the defendant's testimony which he considered "a flimsy excuse" and "impossible and improbable". Moreover, to make the matter worse, the trial Judge told the present jurors that he did not regret his criticism of the prior jurors and that if he had it to do over he would criticize them again.

The trial Judge may have been "inspired by anxiety to assure [petitioner] a fair trial", as stated in the majority opinion below, but his "injudicious" and "indiscreet" remarks overstepped the boundaries of the proprieties in a jury trial far too far to be corrected later by an instruction or additional comment that his criticism of the prior jury's verdict was not justified and that there would be no criticism of the present jurors if they saw fit to return a verdict of not guilty in petitioner's case.

Circuit Judge Finnegan, in the dissenting opinion below, stated:

> Because these remarks created an unfit intellectual climate for adjudicating guilt or innocence I would reverse defendant's conviction and judgment entered thereon. That pre-trial summation of judicial reaction to a previous jury's verdict carries clear intimation and forebodings of potential criticism awaiting any jury whose decision failed to square with views harbored by the presiding judge. His remarks infected the trial environment by engendering fear in the jurors' minds, of criticism. Once these are implanted it

is psychologically futile to attempt eradication by instructions or, even worse, for a reviewing tribunal to recline on the nearest convenient assumption that fundamental rights flourished unimpaired. Intimidation by fear of non-compliance and consequent loss of judicial approbation impaired impartiality.

If I accepted the government's gloss it would simply mean turning my back on practicality and reality while gliding to an affirmance on the notion that those prefatory words were either dissipated by lapse of time or merely constituted an admonition concerning jury duty. Indeed, the impact of the District Judge's words are stressed in this fashion by the government, in its brief:

> Whereupon the trial court, exercising a general duty to interest himself in the fair and impartial administration of justice, *saw fit to comment in no uncertain terms* on the whimsical, capricious or possibly the corrupt verdict of the jury. Who can deny the responsibility of the trial court in such a matter? (Italics supplied)

Responsibility for fair and impartial administration of justice rests upon the trial judge, but this is hardly accomplished by charging the atmosphere of a trial with "comments in no uncertain terms" about past verdicts. I think it time some breadth of vision be achieved in criminal cases.

* * *

* * * It cannot be logically said in one case jury instructions cure alleged errors and then here say the jury paid scant attention, or construed the quoted passage in non-prejudicial terms. I prefer to err, if indeed I do on the side of one accused of crime. See e.g. Bollenbach v. United States, 326 U. S. 607 (1946); United States v. Levi, (7th Cir. 1949) 177 F. 2d 833. Defendants are unclassified when measuring rights accorded them, or to which

they are entitled, during criminal trials. Before the bar, a man is neither tax-evader, murderer, nor petty thief prior to conviction by an impartial tribunal. Trite, distasteful and inconvenient as these elementary principles may appear, persons accused of crime remain entitled to a fair and impartial trial.

Mr. Chief Justice Hughes, delivering the majority opinion, in United States v. Wood, 299 U. S. 123, 145-146 (1936) wrote this trenchant observation which well illustrates my point of concern:

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

Petitioner contends that the remarks of the trial Judge constitute a plain error adversely affecting a substantial right of petitioner, that is the right to a fair trial by an impartial jury, which may be noticed by this Court under Rule 52 (b), Federal Rules of Criminal Procedure, notwithstanding the failure of petitioner to bring the error to the attention of the District Court.

As in *Byars* v. *United States,* 1927, 273 U. S. 28, 32, this Court stated:

> * * * the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In *United States* v. *Atkinson,* 1936, 297 U. S. 157, 160, the Court stated:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

In *Brasfield* v. *United States,* 1926, 272 U. S. 448, this Court considered an alleged error arising from the trial Judge inquiring of the jury, after some hours of deliberation, how it was divided numerically and was informed by the foreman that it stood nine to three without indicating which number favored a conviction. This alleged error, by comparison, was certainly not as prejudicial to the defendant as was the comment of the trial Judge to the jury in the present case. Yet the Court in dealing with the question at page 450, stated:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. . . . It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. Cf. Wiborg v. United States, 163 U. S. 632, 658, et seq., 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 220, et seq.,

49 L. ed. 726, 731, 25 Sup. Ct. Rep. 429; Crawford v. United States, 212 U. S. 183, 194, 53 L. ed. 465, 470, 29 Sup. Ct. Rep. 260; Weems v. United States, 217 U. S. 349, 362, 54 L. ed. 793, 796, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705. This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the harm has been done.

In *Glasser* v. *United States,* 1942, 315 U. S. 60, 82, the Court stated:

> The judge conducting a jury trial in a federal court is "not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." Quercia v. United States, 289 U. S. 466, 469, 77 L. ed. 1321, 1324, 53 S. Ct. 698. Upon him rests the responsibility of striving for that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding.

In *Quercia* v. *United States,* 1933, 289 U. S. 466, 470, 471, the Court stated:

> This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. * * * He may not charge the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered." United States v. Breitling, 20 How. 252, 254, 255, 15 L. ed. 900, 902. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. Hicks v. United States, 150 U. S. 442, 452, 37 L. ed. 1137, 1141, 14 S. Ct. 144; Allison v. United States, 160 U. S. 203, 207, 209, 210, 40 L. ed. 395, 397, 398, 16 S. Ct. 252. * * * "It was for the jury to test the credibility of the

defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law." Allison v. United States, 160 U. S. 203, 40 L. ed. 395, 16 S. Ct. 252, supra.

And in *Bollenbach* v. *United States,* 1946, 326 U. S. 607, 612, 614, 615 this Court stated:

> * * * "The influence of the trial judge on the jury is necessarily and properly of great weight," Starr v. United States, 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.
>
> * * *
>
> * * * In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those "technical errors" which "do not affect the substantial rights of the parties" and must therefore be disregarded. [February 26, 1919] 40 Stat. 1181, c. 48, 28 USCA § 391, 8 FCA title 28, § 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The "technical

errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yale LJ 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. Bruno v. United States, 308 U. S. 287, 293, 294, 84 L. ed. 257, 260, 261, 60 S. Ct. 198; Weiler v. United States, 323 U. S. 606, 611, 89 L. ed. 495, 499, 65 S. Ct. 548, 156 ALR 496. From presuming too often all errors to be "prejudicial", the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

The majority opinion delivered in the Court of Appeals upon the rendering of the judgment sought to be reviewed is clearly at variance and in conflict with the foregoing opinions of this Court, and likewise is in conflict with the decisions of the Court of Appeals of the Fifth Circuit in *Braswell* v. *United States,* 5th Cir. 1952, 200 F. 2d 597, 602 and the Court of Appeals of the District of Columbia Circuit in *Billici* v. *United States,* DC Cir. 1950, 87 App. D. C. 274, 184 F. 2d 394, 24 ALR 881.

In the *Braswell case* the Court of Appeals for the Fifth Circuit, dealt with an alleged error based upon

remarks of the trial Judge to the jury to which the defendants did not specifically object, and stated:

> The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused, free from bias, passion or prejudice. See United States v. Haupt, 7 Cir., 136 F. 2d 661. And where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.
>
> * * *
>
> While counsel for the defendants did not specifically object to the comments of the court on the trial, we think that they affected substantial rights of the defendants and that it is the responsibility of this court to notice them. Rule 52 (b), Federal Rules of Criminal Procedure; United States v. Ward, 3 Cir., 168 F. 2d 226, 228; Robertson v. United States, 84 U. S. App. D. C. 185, 171 F. 2d 345, 346. We think that none of these appellants have had that fair and impartial trial which is their constitutional right, and the judgment is therefore reversed.

In the *Billici case,* the Court of Appeals for the District of Columbia Circuit restated the rules governing the functions and proper relation of the trial Judge to a jury in the trial of a criminal case. Petitioner contends that the remarks of the trial Judge to the jury in the present case clearly violate these rules and deny the petitioner a fair trial by an impartial jury in violation of his rights under the Sixth Amendment to the Constitution of the United States.

It is therefore submitted that the Court of Appeals erred in holding that the remarks of the trial Judge did not constitute plain error adversely affecting a

substantial right of the petitioner and in sustaining the conviction of the petitioner.

II

The Court of Appeals erred in denying petitioner's request to suspend its ruling on the appeal for a reasonable time to afford petitioner an opportunity to present the issues, whether the District Court denied the petitioner his right under the Sixth Amendment to the Constitution of the United States to have the effective assistance of counsel for his defense and whether this right was intelligently and voluntarily waived, to the trial Court and to bring the matter back to the Court of Appeals for a final ruling.

The decision of the Court of Appeals is at variance and in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Butzman et al.* v. *United States,* 6 Cir. 1953, 205 F. 2d 343, 351, certiorari denied 346 U. S. 828.

In the *Butzman case,* the defendants were prosecuted jointly—Butzman for falsely and fraudulently executing a document required by the Internal Revenue Laws and Craig for aiding and advising in the preparation of such document. The United States District Court for the Northern District of Ohio, Eastern Division, rendered judgments of conviction and the defendants appealed. The Court of Appeals for the Sixth Circuit held in substance that the evidence justified the finding of guilt against Butzman, but that Craig would be given an opportunity to present to the trial Court the issue raised for the first time in the Court of Appeals as to whether he had been deprived of his right to the effective assistance of counsel and whether he had intelligently and voluntarily waived this right.

In this case Craig contended for the first time in the Court of Appeals that the Attorney representing both Butzman and Craig had a conflict of interest which deprived Craig of the effective assistance of counsel to which he was entitled.

As to this issue the Court of Appeals for the Sixth Circuit stated:

> * * * Such a conflict of interest deprives an accused of the effective "assistance of counsel" as defined by Supreme Court decisions. Glasser v. United States, 315 U. S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680; United States v. Hayman, 342 U. S. 205, 208, 72 S. Ct. 236, 96 L. Ed. 232. See also Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158. This right is too fundamental to permit a Court to indulge in nice calculations as to the amount of prejudice arising from its denial. Glasser v. United States, supra, 315 U. S. at page 76, 62 S. Ct. 457, 86 L. ed. 680.
>
> It is well settled that the right to the assistance of counsel can be waived. Johnson v. Zerbst, 304 U. S. 458, 469, 58 S. Ct. 1019, 82 L. ed. 1416; United States v. Hayman, supra, 342 U. S. at pp. 208-209, 72 S. Ct. 236, 96 L. ed. 232. However, every reasonable presumption will be indulged against the waiver of such a fundamental right, Glasser v. United States, supra, 315 U. S. at page 70, 62 S. Ct. 457, 86 L. ed. 680, and the Court should "not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, supra, 304 U. S. at page 464, 58 S. Ct. at page 1023, 82 L. ed. 1461. The Supreme Court also said in Johnson v. Zerbst, supra, 304 U. S. at page 464, 465, 58 S. Ct. at page 1023, that an intelligent waiver of the right to counsel depends upon the particular facts and circumstances in each case, and, "whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and

appropriate for that determination to appear upon the record."

Representation by a particular attorney may be under such circumstances as not to meet the constitutional requirement. Glasser v. United States, supra; United States v. Hayman, supra. This issue was not raised in the trial court, and the present record does not show under what circumstances Craig consented to the dual representation. Apparently Craig's present contention is that he did not intelligently and voluntarily waive his right of representation by separate counsel of his own choosing. The Government's contention that such contentions can not be substantiated does not deny appellant the opportunity of supporting them by evidence. Walker v. Johnston, 312 U. S. 275, 287, 61 S. Ct. 574, 85 L. ed. 830. The issue is one which should properly be presented to the trial court instead of being raised for the first time in this Court on an incomplete record. Sec. 2255, Title 28 U. S. Code, provides for such a hearing. United States v. Hayman, supra. The ruling on the appeal of Craig will be suspended for a reasonable period of time, during which the appellant may present this issue to the trial court, if he so desires, following which the matter may be again brought to us for a final ruling.

The right to assistance of counsel means not only the right to employ counsel and to be represented by counsel employed, but it may also mean the right to have counsel appointed or assigned by the Court where the accused is unable to employ counsel. In Federal Courts, the Sixth Amendment to the Constitution of the United States providing inter alia that "in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense," has been construed as granting to an accused unable

to procure the services of an attorney the right to have the Court appoint competent and qualified counsel to assist him.

A defendant's "failure to request counsel does not constitute a waiver when the defendant does not know of his right to counsel." *Gibbs* v. *Burke,* 1949, 337 U. S. 773, 780, 93 L. ed. 1686, 1691, 69 S. Ct. 1247.

In *Johnson* v. *Zerbst,* 1938, 304 U. S. 458, 464, 465, 82 L. ed. 1461, 58 S. Ct. 1019, this Court stated:

> The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

The decision of the Court of Appeals is also at variance and in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Coplon* v. *United States,* D. C. Cir. 1951, 89 U. S. App. D. C. 103, 114, 191 F. 2d 749, certiorari denied, 342 U. S. 926, wherein the Court of Appeals stated:

> The Supreme Court said in Glasser v. United States, 1942, 315 U. S. 60, 76, 62 S. Ct. 457, 467, 86 L. ed. 680: " * * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."
>
> We think it is further true that the right to have the assistance of counsel is so fundamental and

absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial. In the Glasser case, having held that the trial court "denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment", the Supreme Court said: "This error requires that the verdict be set aside and a new trial ordered as to Glasser."

* * *

A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty.

Based upon the foregoing and the transcript herein the judgment of the trial Court should have been reversed by the Court of Appeals for the Seventh Circuit.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Dated at Washington, D. C. this 1st day of July, 1955.

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APPENDIX

APPENDIX

Opinions Below

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11209

October Term, 1954

April Session, 1955

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

GEORGE F. VASEN, *Defendant-Appellant.*

April 15, 1955

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Defendant was convicted upon nine counts of an indictment charging use of the mails in carrying out a scheme to defraud, by selling fraudulent fractional undivided interest in oil, gas and other mineral rights in violation of Section 77(b) of the Securities Act, Title 15 U. S. C. He was sentenced upon certain counts to five years in the custody of the Attorney-General and ordered placed on probation for a period of five years, following his release from custody, upon others. On appeal he assigns error as follows: (1) he was deprived of a fair trial by certain remarks of the court to the jury; (2) certain evidence was improperly admitted; (3) the court

erroneously charged the jury. The record reflects no timely objection in the trial court upon any of these points.

Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., prescribes the time and place for making objections to instructions. In the absence of compliance with this rule, defendants are precluded from reviewing the action of the court. *U. S.* v. *Kaadt,* 171 F. 2d 600 (CA-7); see also *U. S.* v. *Sutter,* 160 F. 2d 754 (CA-7). Other courts have consistently decided likewise. See *Felton* v. *U. S.,* 170 F. 2d 153, cert. denied 335 U. S. 831 (CA-DC); *Bartlett* v. *U. S.,* 166 F. 2d 920 (CA-10). This rule is, in its essence, the same as that of Rule 51 of the Rules of Civil Procedure, 28 U. S. C. A, as to which it has repeatedly been declared that the purpose of requiring objections is to insure that the trial judge may be advised of possible errors upon his part and to give him an opportunity to correct them. For this reason, any objection must be fairly and promptly directed to the trial court in order that errors may be avoided. *Stilwell* v. *Hertz Driveurself Stations,* 174 F. 2d 714 (CA-3); *Hower* v. *Roberts,* 153 F. 2d 726 (CA-8); *Williams* v. *Powers,* 135 F. 2d 153 (CA-6). In other words the court must be given opportunity to rectify any inadvertent wrongful charge, statement or ruling. *Allen* v. *Nelson Dodd Produce Co.,* 207 F. 2d 296 (CA-10); *Green* v. *Reading Co.,* 183 F. 2d 716 (CA-3). This reasoning applies to every instance of assigned error where the action of which complaint is made is such that, if called to the court's attention, it might have been corrected. This includes rulings in the course of the trial, comments of the court and instructions to the jury. In all such instances common fairness requires that before it can be successfully contended on appeal that the trial court has erred, that court must have been given an opportunity to rectify any inadvertent comment, ruling or instruction. It follows from the record in this case that defendant, inasmuch as he preserved no timely objection to any action on the part of the trial court of which he now complains, is without right to invoke this court's jurisdiction to consider the

assigned errors, unless they be of that serious character condemned by Rule 52(b), of the Rules of Criminal Procedure, 18 U. S. C. A.

Under Rule 52(b) plain errors "affecting substantial rights may be noticed" although not brought to the attention of the trial court. We remarked in *United States* v. *Raub*, 177 F. 2d 312, at 315: "Such errors must, however, be substantial and capable of resulting in miscarriage of justice to warrant the reversal of a judgment of conviction based on ample evidence. We must not lightly invoke Rule 52(b)." And when issues have, on the whole been left to the jury in substantial compliance with the applicable law, we will not notice an error which the trial judge has not been asked to correct unless substantial rights have been adversely affected; that is to say, only seriously prejudicial error will be noticed, in the absence of objection. *U. S.* v. *Kirby*, 176 F. 2d 101 (CA-2); *Himmelfarb* v. *U. S.*, 175 F. 2d 924, cert. denied 338 U. S. 860 (CA-9); *U. S.* v. *Krulewitch*, 167 F. 2d 943, reversed on other grounds in 336 U. S. 440 (CA-2); *U. S.* v. *Williams*, 146 F. 2d 651, cert. denied 324 U. S. 876 (C.A.-2). The error must be such as would result in manifest miscarriage of justice or affect seriously the fairness of judicial proceedings. *Smith* v. *U. S.*, 173 F. 2d 181 (CA-9). See also *Benson* v. *U. S.*, 112 F. 2d 422, cert. denied 311 U. S. 644 (CA-5). Thus, in *U. S.* v. *Bazzell*, 187 F. 2d 878, we refused, in our discretion, to find that plain error had occurred. See also *U. S.* v. *Sferas*, 210 F. 2d 69, cert. denied, *Skally* v. *U. S.*, 347 U. S. 935 (CA-7); *Apodaca* v. *U. S.*, 188 F. 2d 932 (CA-10). And in *United States* v. *Jones*, 204 F. 2d 745, cert. denied 346 U. S. 854, at 749 we said, citing *United States* v. *Jonikas*, 187 F. 2d 240 (CA-7): "In view of the failure of defendant's counsel to advance the explicit contention here asserted, but 'consciously failed to save the point' in the court below, we can not say that the error was obvious. * * * We shall not, in a flagrant case, give cognizance to a complaint first made to us and thus give defendant two bites at the same cherry, by declaring erroneous action of the

trial court, the fault of which defendant did not see fit to make the court aware, when he had the opportunity to do so."

Defendant complains chiefly of comments of the District Judge to the jury after the jurors had been sworn, but before they had received any evidence. Evidently the judge had been dissatisfied with an apparent miscarriage of justice in a previous case, where the jury had ignored the evidence and acquitted a defendant who, the judge undoubtedly thought, was guilty. Rather wide publicity had been given the incident by the press. However, it is apparent from reading the comments that, out of a superabundance of caution, the judge was advising the jury that, though he had criticized the jury in one case widely publicized in the newspapers, he was not in the habit of doing so. Obviously, he was fearful that the newspaper reports might have inspired in the jurors' minds the false idea that he was addicted to the practice of criticizing verdicts. What he said was obviously intended to advise them that he did not ordinarily do so and to assure them that they were free to exercise freely their inherent independent functions as jurors. This is obvious from his concluding remark that, in fairness to all defendants, he "wanted" the jury to know that he had no preconceived ideas. He added: "I make that statement because I want this defendant and * * * the Government both to have a fair trial, and I do not want you to have any idea that I participate in or have any notions or am in the habit of criticizing juries about their decisions."

As we have pointed out, to these comments no objection was made. If there was anything in any part of the comments deemed prejudicial, it was defendant's duty to object and to call to the judge's attention what he deemed erroneous in order that the court might rectify any error made. But the first complaint of these comments is made on appeal. Clearly, we are without right to consider or to

determine the error assigned, unless we can say as a matter of law that it constituted manifest error with resulting prejudice to the rights of defendant.

It seems obvious that, despite the good intentions of the judge, it was injudicious on his part to comment upon a prior case. But he was inspired by anxiety to assure defendant of a fair trial. Any apparent inadvertent overstepping of the boundaries of the proprieties in a jury trial in the way of indiscreet remarks, we think was, in view of the complete remarks, wholly without legal significance. We cannot see that the defendant was in any wise prejudiced by what was said. The jury was selected on Jan. 5, 1954. The trial began Jan. 18, and continued intermittently until March 2, 1954. At no time did defendant complain. Considering all the circumstances, we are of the opinion that it is beyond our province to declare that prejudicial error intervened.

In this connection we observe that defendant tendered instructions fully defining the functions of the jury as the exclusive triers of the facts, which were given by the court. One was, in pertinent part, as follows: "You are instructed that the jury is the sole judge of the facts in this case * * *. And in anything that the court may say in these instructions, the court has not intended, and he does not now intend to express any opinion upon the facts of this case, on the credibility of the witnesses, or the weight to be given their testimony." The court also approved and gave defendant's instruction number 11 which it characterized, in colloquy with counsel, as telling the jury "it is their duty to find the defendant not guilty if they possibly can." The effect of these and other similar instructions was to advise the jury fully and completely of their duty to ignore the court's remarks in the course of the trial, except those as to the controlling law, and to point out clearly their exclusive function of determining where the truth lay. Having failed to object to remarks at the time they were

made, defendant might, if he felt himself prejudiced, have eliminated that prejudice by asking the judge to give an express exclusionary instruction, and in case of his failure to do so, have preserved the point he now attempts to raise.

It is urged that the court erred in instructing the jury as to the essential element of guilty knowledge of the falsity of the representations made. It exhaustively instructed the jury as to the essentials of proof and the law governing the indictment and the trial. In the course of his charge, however, the judge used these words: "It is not necessary, however, for you to find that the defendant had actual knowledge of the falsity of the representations being made. That part may be inferred from the evidence." The court had fully explained that before the defendant could be found guilty it was necessary to find, beyond all reasonable doubt, that he had knowledge of the falsity of the representations made. But, as the judge said, guilty knowledge may be inferred where its asserted lack consists of ignorance of facts which ordinary persons under similar circumstances should have known, and the defendant could not be found guilty unless the jury found from the evidence that he must have known of the falsity. Proof of knowledge of falsity of what is said is seldom susceptible of proof by direct testimony. We cannot reach into a man's mind and pick out any tangible, physical evidence of what has transpired in his mental processes. Of necessity, recourse to proved circumstances alone must supply the answer. Consequently, the jury, considering the circumstances, was called upon to determine whether it appeared, beyond all reasonable doubt, that defendant knew or was bound to know that what he said and did was done knowingly. Such was the full import and impact of the court's complete charge. Obviously, it was endeavoring to advise the jury that before defendant could be found guilty, the circumstances proved must justify, beyond all reasonable doubt, only an inference that the defendant knew of the

untruth of what he said or wrote. *Bentel* v. *U. S.*, 13 F. 2d 327 (CA-2). Of course, guilty knowledge must be proved beyond all reasonable doubt, as the court charged, but proof of actual existence of such knowledge is not required; scienter may always be inferred from the proved circumstances, where its asserted lack is based on ignorance of evidentiary facts which any ordinary person under similar circumstances would be bound to know. *Stone* v. *U. S.*, 113 F. 2d 70 (CA-6); *Schwinn* v. *U. S.*, 112 F. 2d 74, aff'd *per curiam* 311 U. S. 616 (CA-9); *U. S.* v. *Sylvanus*, 192 F. 2d 96, cert. denied 342 U. S. 943 (CA-7). It being apparent that the court correctly instructed the jury in this respect, it cannot be said that plain error intervened or even that, had there been an objection, it would have raised any meritorious ground for review here. Obviously, if defendant thought the instructions were not clear, he had a right and duty to object at the time they were given in the manner provided by the rule in order that the court might have full opportunity to amend the charge if it saw fit to do so.

Defendant asserts error because a Government witness, a lawyer, was permitted on re-direct examination, to testify that, in his opinion, the securities involved came within the Securities Act. Section 77(b) of that Act defining securities, includes among other things, "fractional undivided interest in oil, gas or other mineral rights." The instruments involved were strictly within this limited category; indeed they were of the exact character defined in the quoted words. The court, in essence, instructed the jury as a matter of law that the undivided interests in oil, gas and other mineral rights which defendant was charged with having sold were within the statute. Consequently, the proof of which complaint is made, was wholly superfluous and, if objection had been made, the answer could and probably would have been excluded. But there was no error, for the reason that the witness merely testified to what the court instructed the jury was true as a matter of

law. That the securities were within the statute, cannot be questioned. Not only, therefore, was there failure to object, but there was complete absence of plain error which would justify us in invoking Rule 52(b).

We have before us a case where the evidence of guilt was voluminous and convincing. Indeed defendant does not question the sufficiency of the evidence, or its overwhelming character. But though he has desisted from raising objections to testimony of which he now complains, though he complains of the court's comments to which he has preserved no objection, and though he attacks the court's instructions, all of which could have been corrected if the court's attention had been called to any possible error, at the proper time and place, he now insists that, despite his apparent original thought that none of these matters of which he complains was erroneous, they were plain prejudicial errors. We cannot subscribe to this conclusion.

Defendant asserts broadly that he was deprived of a fair trial, yet nothing in the record supports the premise. True his original counsel had an attack of laryngitis, but the court, with sympathetic appreciation of the situation, continued the cause for defendant's opening statement and later advised the jurors, on January 26, that associate counsel had been brought in and would participate in the trial as counsel. So, after Jan. 26, until the trial was concluded on March 3, two attorneys appeared for and represented defendant, both of whom, so far as this record discloses, were competent and able. Certainly the record reflects no basis whatever for defendant's assertions in this respect.

Nor was the judgment defective. Though cumbrously phrased, it is clear that defendant was sentenced to 5 years in the custody of the Attorney-General upon certain named counts, and placed on probation, at the expiration of that sentence, for 5 years on certain other named counts. The

sentence conformed to the requirements of Title 18, Sec. 3651 U. S. C. See *Weber* v. *Squier*, 124 F. 2d 618, cert. denied 315 U. S. 810 (CA-9); *Palmer* v. *Sanford*, 57 Fed. Supp. 104, aff'd 147 F. 2d 549, cert. denied 325 U. S. 878 (CA-5).

The judgment is

AFFIRMED.

FINNEGAN, *Circuit Judge*. Dissenting. Immediately preceding the government's opening to the jury, sworn and waiting to try defendant on an indictment charging violations of 18 U. S. C. § 1341 and 15 U. S. C. § 77q(a), the District Judge addressed those jurors as follows:

> "The Court: Now Ladies and Gentlemen, we will have the opening statement by the Government. It just happens that counsel for the defendant has a severe condition of laryngitis, and I will not impose upon him to give his opening statement this afternoon. We will then adjourn until one o'clock Monday when we will resume and have his statement and proceed with the case, putting on evidence.
>
> I apologize for the delay today, but since you were here I tried a number of cases; one of them we just finished today, involving a complicated matter. It just happened it ran over and I couldn't help it.
>
> I think in fairness to this defendant I should say something to you Ladies and Gentlemen before this case starts. I do not want you people to get the impression that I as a judge have any notion about what you should do as members of the jury, and I am going to try to give this defendant a fair trial and give the Government a fair trial.
>
> I have been practicing law and been a judge altogether over a period of upwards of twenty-seven years; about twenty-five of that was as a lawyer. I have disagreed with a few juries, and not too much. I never

criticized but one jury in my life, as a practicing lawyer or as a judge. Most of the decisions that I have seen since I have been a judge were just about the same as I would have rendered. I did criticize one, and some of you may know about it, and I do not regret that I did. If I had it to do over I would again, because in that particular case we had a man who sat here on the witness stand who was charged with robbery and admitted when he took the stand—he did not have to take the stand, but he took the stand and admitted himself that he had been convicted of larceny, and then he admitted that he had pleaded guilty to robbery before, and the jury saw four deputies necessary, sitting around him during the whole time.

When the evidence began to get pretty conclusive about the man at the bank who went to the back door and looked out and saw a car bearing license that was the same number as was on this man's car, the same description of the car, and a man who resembled this man, was blond and gave a description, but too far away to identify him—when it began to get too warm he talked to his attorney and the attorney gets up and says: 'Now, we'll admit that the car in which the robbery was done belonged to us, that it belonged to my client, that he had it in his possession immediately before the robbery, about thirty minutes, and that he had it in his possession immediately after the robbery. The only thing of it is my client went over to get a haircut while it happened.'

And then the testimony further showed that he left a place way up on the north side at three-thirty, on Bosworth Avenue, 1300 something, he took his sister-in-law to his mother's—mind you, leaving at three-thirty—took his sister-in-law to her mother's at her address; then he took his sister-in-law's brother-in-law

to this place where the haircut was to take place; then he took the car over to another place, turned it over to one of the two fellows who had testified that they were with him and held up the bank and used the guns, and that the car and the guns were furnished by him, and who were not in any way impeached—two much younger fellows—all of that—and the robbery was done and completed and the police were there at five minutes after four, in a period of thirty-five minutes that he accomplished all of those many things.

It sounded to me like you would have had to have Aladdin's magic carpet to have moved around over the city of Chicago, because that was out on Harrison Street, around Harrison Street and Crawford, and then still the car had to get over to Cicero where the robbery occurred. I was so impossible and improbable.

But I think in fairness to any defendant that I want you to know that I haven't got any preconceived notions. But in a case like that, a man that confesses that he was guilty of robbery but he just didn't do this one, and with such a flimsy excuse.

I make that statement because I want this defendant and I want the Government both to have a fair trial, and I do not want you to have any idea that I participate in or have any notions or am in the habit of criticizing juries about their decisions.

Counsel for the Government will proceed."

Because these remarks created an unfit intellectual climate for adjudicating guilt or innocence I would reverse defendant's conviction and judgment entered thereon. That pre-trial summation of judicial reaction to a previous jury's verdict carries clear intimation and forebodings of potential criticism awaiting any jury whose decision failed to square with views harbored by the presiding judge. His remarks

infected the trial environment by engendering fear in the jurors' minds, of criticism. Once these are implanted it is psychologically futile to attempt eradication by instructions or, even worse, for a reviewing tribunal to recline on the nearest convenient assumption that fundamental rights flourished unimpaired. Intimidation by fear of noncompliance and consequent loss of judicial approbation impaired impartiality.

If I accepted the government's gloss it would simply mean turning my back on practicality and reality while gliding to an affirmance on the notion that those prefatory words were either dissipated by lapse of time or merely constituted an admonition concerning jury duty. Indeed, the impact of the District Judge's words are stressed in this fashion by the government, in its brief:

> "Whereupon the trial court, exercising a general duty to interest himself in the fair and impartial administration of justice, *saw fit to comment in no uncertain terms* on the whimsical, capricious or possibly the corrupt verdict of the jury. Who can deny the responsibility of the trial court in such a matter?" (italics supplied)

Responsibility for fair and impartial administration of justice rests upon the trial judge, but this is hardly accomplished by charging the atmosphere of a trial with "comments in no uncertain terms" about past verdicts. I think it time some breadth of vision be achieved in criminal cases.

Any cutting edge, seemingly possessed by *Lehman* v. *District of Columbia*, 19 App. D. C. 217 (1902), cited to us by the government as dispositive of the problem, is quickly dulled on close reading of that case. There a district judge received a verdict from jury A in the presence of jury B—then trying issues involving Lehman. That district judge directed some brief (*ibid*, 227) and blunt remarks to

the foreman of jury A, and, no doubt Lehman's jurors overheard. At bar, the trial judge addressed only the Vasen jury, his captive audience. Furthermore, the Lehman judge specifically covered the episode by charging jury B (Lehman's jurors) *inter alia* (id. 228): "I do not want you to take to yourselves anything I said to them." (referring to jury A). It cannot be logically said in one case jury instructions cure alleged errors and then here say the jury paid scant attention, or construed the quoted passage in non-prejudicial terms. I prefer to err, if indeed I do, on the side of one accused of crime. See *e. g. Bollenbach* v. *United States*, 326 U. S. 607 (1946); *United States* v. *Levi*, (7th Cir. 1949) 177 F. 2d 833. Defendants are unclassified when measuring rights accorded them, or to which they are entitled, during criminal trials. Before the bar, a man is neither tax-evader, murderer, nor petty thief prior to conviction by an impartial tribunal. Trite, distasteful and inconvenient as these elementary principles may appear, persons accused of crime remain entitled to a fair and impartial trial.

Mr. Chief Justice Hughes, delivering the majority opinion, in *United States* v. *Wood*, 229 U. S. 123, 145-146 (1936) wrote this trenchant observation which well illustrates my point of concern:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

Methodology utilized in selecting, or eliminating prospective jurors from the rolls, is of course, not the sole criteria of impartiality. It is no idle gesture which finally forbade trial judges from directing, directly or indirectly, verdicts of guilty, or from trenching on the jury's domain.

In these times, turbulent with conflicting and competing ideologies, democracy's best credentials stem from how we *actually* administer justice. Laymen everywhere quickly discern differences between actions and words. Our theory of government and law will quickly rot and wither planted among shallow applications of basic tenents in empty ceremonies. Long ago tyranny and domination were pruned out of governmental theory leaving us freemen governing ourselves consonant with principles of liberty and individual freedom. No small part of this heritage is the organic law provision for fair and impartial trials. Better several scoundrels escape because we may strike down basically unjust and biased procedures, than one innocent person suffer an unfair forfeit. Fed. R. Crim. P. 52 (b), 18 U. S. C. *Ad hoc* deviations, for expediency's sake, tend to taint and corrode the entire administration of criminal law. I am well aware that ordering new trials casts a heavy burden upon both sides. Nor have I overlooked problems arising in connection with reassembling witnesses and proof; that both sides are now educated to one another's case. Yet, in my opinion, these factors fail in counterbalancing the need for retrying Vasen's case.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Statutes

Section 1341, Title 18, U. S. Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

Section 77 q (a), Title 15, U. S. Code provides:

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or

any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * May 27, 1933, c. 38, Title I, § 17, 48 Stat. 84.

Section 77 e (a), Title 15, U. S. Code provides:

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * May 27, 1933, c. 38. Title I, § 5, 48 Stat. 77; June 6, 1934, c. 404, § 204, 48 Stat. 906.

Section 2255, Title 28, U. S. Code, in part provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without juris-

diction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may be appropriate.

* * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * * June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, § 114, 63 Stat. 105.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 197

GEORGE F. VASEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. 1-14; R. 70-81)[1] are reported at 222 F. 2d 3, 9.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1955 (R. 82). On June 3, 1955,

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[1] "R." refers to the transcript of record in two volumes, which we have numbered in pencil consecutively, pp. 1-84. "Tr." refers to the typewritten transcript of the testimony at the trial.

that court denied a petition for rehearing (R. 83). The petition for a writ of certiorari was filed on July 1, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's remarks to the jury, after it had been sworn but before the beginning of the trial, concerning a verdict of acquittal by a different jury in a prior unrelated case constituted plain error under Rule 52(b), F. R. Crim. P.

2. Whether petitioner was entitled to a remand for a hearing before the trial court with respect to allegations, made for the first time in a petition for rehearing in the court of appeals, that he had been denied the effective assistance of counsel.

RULE INVOLVED

Rule 52(b), Federal Rules of Criminal Procedure, provides as follows:

> PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner was charged in an indictment returned in the United States District Court for the Northern District of Illinois under counts 1, 2, 3, 4 and 7 with use of the mails in carrying out a scheme to defraud in violation of 18 U.S.C. 1341 (R. 5-17, 20); under counts 8, 9 and 10 with selling fraudulent, fractional undivided interests in oil and gas rights,

in violation of 15 U.S.C. 77q(a) (R. 21-23); and under count 11 with unlawfully using the mails to sell a certain security without a registration statement in violation of 15 U.S.C. 77e(a) (R. 24).[2] The jury found petitioner guilty as charged (R. 42). He was sentenced to imprisonment for five years on count 1, placed on probation as to the other counts for a period of five years to commence at the expiration of the sentence under count 1, and fined $25,000 in the aggregate (R. 44). On appeal (R. 54-55), the judgment was affirmed (R. 82).

On January 15, 1954, after the jury had been sworn and before the trial began, the court addressed the jury as follows (Tr. A-E):

> Now, Ladies and Gentlemen, we will have the opening statement by the Government. It just so happens that counsel for the defendant has a severe condition of laryngitis, and I will not impose upon him to give his opening statement this afternoon. We will then adjourn until one o'clock Monday when we will resume and have his statement and proceed with the case, putting on evidence.
>
> I apologize for the delay today, but since you were here I tried a number of cases; one of them we just finished today, involving a complicated matter. It just happened it ran over and I couldn't help it.

---

[2] Counts 5, 6, and 12 were dismissed (Tr. 2317, 2321).

I think in fairness to this defendant I should say something to you Ladies and Gentlemen before this case starts. I do not want you people to get the impression that I as a judge have any notion about what you should do as members of the jury, and I am going to try to give this defendant a fair trial and give the Government a fair trial.

I have been practicing law and been a judge altogether over a period of upwards of twenty-seven years; about twenty-five of that as a lawyer. I have disagreed with a few juries, and not too much. I never criticized but one jury in my life, as a practicing lawyer or as a judge. Most of the decisions that I have seen since I have been a judge were just about the same as I would have rendered. I did criticize one, and some of you may know about it, and I do not regret that I did. If I had it to do over I would again, because in that particular case we had a man who sat here on the witness stand who was charged with robbery and admitted when he took the stand—he did not have to take the stand, but he took the stand and admitted himself that he had been convicted of larceny, and then he admitted that he had pleaded guilty to robbery before, and the jury saw four deputies necessary, sitting around him during the whole time.

When the evidence began to get pretty conclusive about the man at the bank who went to

the back door and looked out and saw a car bearing license that was the same number as was on this man's car, the same description of the car, and a man who resembled this man, was blond and gave a description, but too far away to identify him—when it began to get too warm he talked to his attorney and the attorney gets up and says: "Now, we'll admit that the car in which the robbery was done belonged to us, that it belonged to my client, that he had it in his possession immediately before the robbery, about thirty minutes, and that he had it in his possession immediately after the robbery. The only thing of it is my client went over to get a haircut while it happened."

And then the testimony further showed that he left a place way up on the north side at three-thirty, on Bosworth Avenue, 1300 something, he took his sister-in-law to her mother's —mind you, leaving at three-thirty—took his sister-in-law to her mother's at her address; then he took his sister-in-law's brother-in-law to this place where the haircut was to take place; then he took the car over to another place, turned it over to one of the two fellows who had testified that they were with him and held up the bank and used the guns, and that the car and the guns were furnished by him, and who are not in any way impeached—two much younger fellows—all of that—and the robbery was done and completed and the police were there at five minutes after four, in a

period of thirty-five minutes that he accomplished all of those many things.

It sounded to me like you would have had to have Aladdin's magic carpet to have moved around over the city of Chicago, because that was out on Harrison street, around Harrison Street and Crawford, and then still the car had to get over to Cicero where the robbery occurred. It was so impossible and improbable.

But I think in fairness to any defendant that I want you to know that I haven't got any preconceived notions. But in a case like that, a man that confesses that he was guilty of robbery but he just didn't do this one, and with such a flimsy excuse.

I make that statement because I want this defendant and I want the Government both to have a fair trial, and I do not want you to have any idea that I participated in or have any notions or am in the habit of criticizing juries about their decisions.

Counsel for the Government will proceed.

The trial began on January 18, 1954 (Tr. 1). On January 26 the following occurred (Tr. 898-899):

The COURT: Ladies and gentlemen of the jury, we have had a conference between counsel, and Mr. Swalwell's [petitioner's attorney] health is not too good. He is bringing in an associate counsel. Will you give your full name?

Mr. BURNS: Joseph F. Burns.

The COURT: Mr. Joseph F. Burns is joining Mr. Swalwell as co-counsel at this time and will participate in the trial.

Mr. Swalwell continued to cross-examine prosecution witnesses (Tr. 899, 927, 980, 1005, 1020, 1123, 1199, 1374, 1479, 1499, 1535, 1562, 1639, 1659, 2260); conducted the direct examination of defense witnesses (Tr. 1684, 1765, 1828, 1856, 1966, 1997, 2050, 2067, 2083, 2189); and made the closing argument to the jury (Tr. 2319). Mr. Burns cross-examined one prosecution witness (Tr. 1612); made a few objections at the trial (Tr. 973, 1109, 1219, 1572); objected to instructions (Tr. 2294-2298); and made a short argument supporting a motion for acquittal (Tr. 2312-2315).

In the final charge given on March 2, 1954 (Tr. 2312), the court instructed the jury *inter alia*:

> * * * Your duties make you the sole and exclusive judges of the facts. You must determine what the facts are from the evidence which is presented. In your deliberations you will, therefore, divest your mind of every fact and circumstance other than those disclosed by the evidence bearing upon the guilt or innocence of the defendant. [Tr. 2322-2323.]
>
> * * * * *
>
> You are instructed that the jury is the sole judge of the facts in this case * * *. And in

anything that the court may have said throughout the trial, or anything that the court may say in these instructions, the court has not intended, and he does not now intend to express any opinion (on) the facts of the case, on the credibility of the witnesses, or the weight to be given their testimony. [Tr. 2341.]

* * * * *

* * * If there is any reasonable hypothesis based upon the consideration of the whole evidence in the case and consistent therewith, upon which you can acquit the defendant in this case, then it is your duty to take such hypothesis and to find the defendant not guilty, for it is not your duty to look for some theory upon which you can convict the defendant, but on the contrary it is your duty, and the law requires you, if you can consistently and reasonably do so, to reconcile any and all circumstances, and the whole evidence of the case, with the innocence of the defendant, and if by so doing, the innocence of the defendant appears, or if a reasonable doubt of the guilt of the defendant arises, the jury must acquit the defendant. [Tr. 2329-2330.]

ARGUMENT

1. Petitioner contends (Pet. 13-22) that the court below erred in concluding that the trial court's remarks about another case before trial, to which no objection was made at the trial, were not of such nature as to require reversal of the judgment of conviction under Rule 52(b).

Even though the judge's remarks may have been "injudicious" and "indiscreet", as the majority below observed (Pet. App. 5), they were not of such nature as to constitute plain error under Rule 52. Cf. *Lehman* v. *District of Columbia,* 19 App. D.C. 217, 226-231; *Anderson* v. *Commonwealth,* 144 Va. 544, 548; *State* v. *Little,* 174 N.C. 793, 795-796. The judge was speaking of a verdict in a robbery case tried before him about one month previously, involving charges entirely different from those in the instant case. Nowhere in the text of his comments is there any suggestion of an expression of opinion as to petitioner's guilt or innocence. The judge merely made it clear that, if the jurors had perchance read or heard of his criticism of the other jury, they were not to let that influence them in their deliberations. A review of the record herein reveals no statement of "views harbored by the presiding judge" (see dissent below, Pet. App. 11), which might have influenced the jury in their deliberations for fear of criticism by the judge. He disavowed "any preconceived notions", and concluded, "I make that statement because I want this defendant and I want the Government both to have a fair trial, and I do not want you to have any idea that I participate in or have any notions or am in the habit of criticizing juries about their decisions" (Tr. E).

Moreover, in the final charge, some six weeks later, the jurors were instructed that they were the sole judges of the facts; that they should divest their minds of every fact and circumstance other

than those disclosed by evidence concerning the guilt or innocence of petitioner; that the judge did not intend to express any opinion on the facts of the case, the credibility of the witnesses, or the weight to be given their testimony; and that if there was any reasonable hypothesis based upon all the evidence upon which they could acquit the petitioner, they should do so. Statement, *supra*, pp. 7-8. The jurors thus were carefully instructed that they were to reach their verdict by the free and independent exercise of their minds without interference by the judge.

The fact that the preliminary comments of the judge were not objected to at the time is significant as tending to show that, in the context of the place and time and in the light of the demeanor of the trial court, they were not regarded by petitioner as prejudical. For an alleged error to be noticed under Rule 52(b), F. R. Crim. P., it must be seriously prejudical, affect substantial rights, and be capable of resulting in a miscarriage of justice. *United States* v. *Kirby*, 176 F. 2d 101, 104 (C.A. 2); *United States* v. *Jones*, 204 F. 2d 745, 749 (C.A. 7), certiorari denied, 346 U.S. 854; *Himmelfarb* v. *United States*, 175 F. 2d 924, 950-951 (C.A. 9), certiorari denied, 338 U.S. 860. Petitioner has not demonstrated that the judge's challenged remarks, even if error, were of sufficient gravity to constitute reversible error under Rule 52(b).[3]

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[3] Decisions cited by petitioner as being in conflict with the decision below are not apposite. *Brasfield* v. *United States*,

2. On his original appeal to the court of appeals, petitioner argued that he had been deprived of a fair trial because of the illness of his original counsel (see Pet. 8a). In a petition for rehearing in that court, he asserted for the first time that he had been denied the effective assistance of counsel and requested the court to remand the cause for a hearing on that question in the district court. He alleged that if given the opportunity, he could prove the facts now set forth at pages 10-13 of his petition to the effect (1) that defense attorney Swalwell had never intended to try the case because of illness, and was forced to trial without adequate preparation; and (2) that the trial court did not question petitioner as to his alleged financial inability to employ counsel or advise him of his right to have counsel appointed. The petition for rehearing was denied (R. 83).

Petitioner argues that under the procedure authorized in *Butzman* v. *United States*, 205 F. 2d 343, 351 (C.A. 6), certiorari denied, 346 U.S. 828, he should have been permitted to prove his allegations at a district court hearing before the court of appeals acted on his petition for rehearing. But clearly the court below did not abuse its discre-

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272 U.S. 448, involved an improper request by the trial judge of a divided jury as to their numerical division. *Bollenbach* v. *United States*, 326 U.S. 607, was concerned with a prejudicial last minute instruction, delivered after the jury had been unable to agree upon a verdict. In *Quercia* v. *United States*, 289 U.S. 466, a trial judge's comment that he thought the defendant was lying because he wiped his hands during his testimony, was held prejudicially erroneous.

tion in refusing to suspend its judgment of affirmance on the basis of petitioner's belated contentions. Petitioner presented no facts which would support his claim that he was denied the effective assistance of counsel. When an accused appears for trial with counsel of his choice, the trial court is not required to investigate his ability to pay an attorney's fee, and then advise him that the court will appoint a different attorney if he wishes one. Petitioner had no trouble obtaining a $10,000 appeal bond (R. 47, 51) and producing out of town witnesses to testify on his behalf. The record discloses a vigorous and competent defense of petitioner's case by Mr. Swalwell, who continued to the end of the trial as the more active counsel even after Mr. Burns entered the case as associate counsel. See Statement, *supra,* pp. 6-7; Pet. App. 8. Moreover, it should be noted that the judgment of the court below does not foreclose a judicial test of petitioner's belated contentions by motion under 28 U.S.C. 2255.

CONCLUSION

The judgment of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1955.

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